# SUPREME COURT OF THE UNITED STATES.

No. 558.—October Term, 1920.

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| Weeds, Inc., and Gurdon H. Smith, Plaintiffs in Error, *vs.* The United States of America. | In Error to the District Court of the United States for the Northern District of New York. |

[February 28, 1921.]

Mr. Justice Pitney, concurring.

In this case, as in No. 324, *United States* v. *L. Cohen Grocery Co.*, while concurring in the judgment of the court, I am unable to yield assent to the grounds upon which it is based.

Most of the counts in the indictment upon which plaintiffs in error were convicted allege specific violations of that provision of the Act of October 22, 1919 (Ch. 80, sec. 2, 41 Stat. 297, 298, amending sec. 4 of the Act of August 10, 1917, Ch. 53, 40 Stat. 276, 277), which declares it unlawful "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries"; the alleged offenses having consisted in the sale of specific articles of merchandise at excessive prices. Respecting these, my views are expressed in the concurring opinion in the *Cohen Grocery Co.* case.

The remaining count alleges a conspiracy to exact, and to aid and abet in exacting, excessive prices for certain specified necessaries. I see no unconstitutional lack of definiteness in the prohibition of a conspiracy to exact excessive prices for necessaries. In the absence of a statutory definition of, or method of determining, standard prices, with which to compare the prices alleged to be excessive, the natural standard, according to which this provision of the Act ought to be interpreted, is that adopted in the ordinary transactions of men, and adhered to by the common law time out of mind—the standard of fair market value: the price prevailing under current conditions of supply and demand, un-

influenced by manipulation. So construed, I regard this provision as clearly constitutional, and need only refer to *Nash* v. *United States*, 229 U. S. 373, 377. *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 221-223, is distinguishable. In that case it was conceded, *arguendo*, that a standard fixed by market value under fair competition and normal market conditions was admissible; and the statute was denounced only because in truth it did not apply this standard, but called for an estimate of what prices would have been under non-existent and imaginary conditions. To the same effect, *Collins* v. *Kentucky*, 234 U. S. 634, 638.

I assume (as the court has this day held) that the provision declaring it unlawful "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" is unconstitutional for want of a definite standard; but this does not carry with it the provision now in question, since by sec. 22 of the Act of August 10, 1917 (40 Stat. 283), it is declared that if any clause, sentence, paragraph, or part of the Act be adjudged to be invalid, this shall not affect or invalidate the remainder, but shall be confined in its operation to the clause, etc., directly involved—a conclusive declaration by Congress that the various provisions of this complicated statute shall be regarded as separable.

The record shows, however, that the trial court repeatedly rejected testimony offered by defendants for the purpose of showing the market value of the goods in question at times material to the controversy, and that exceptions were duly allowed. The effect of the rulings was to deprive defendants of the benefit of this standard, by which the jury might have determined whether the prices defendants agreed to exact for the merchandise were excessive; and for this reason only I concur in the reversal of the judgment of conviction as to this count. As to the other counts, I concur in the reversal upon the ground that the statute, in declaring it unlawful "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries", does not include the exaction of an excessive price for merchandise sold.

Mr. Justice BRANDEIS concurs in this opinion.